

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Anthony K. Anderson,

Case No. 2:21-cv-00514-CDS-EJY

Plaintiff

Order Granting Defendant's Motion to Dismiss

V.

Nevada Department of Corrections, et al.,

[ECF No. 66]

Defendants

10 This is a 42 U.S.C. § 1983 action. Plaintiff Anthony K. Anderson brings an Eighth
11 Amendment claim for deliberate indifference to serious medical needs against defendants
12 Timothy Kelly, M.D. (“Dr. Kelly”), a Rheumatology physician, the Nevada Department of
13 Corrections (“NDOC”), Rebeca Kozloff, an NDOC corrections officer, and the following medical
14 care providers: Henry Landsman, M.D. (“Dr. Landsman”), Romeo Aransas, M.D., and Sonya
15 Carrillo, R.N. ECF No. 48 at 15–16. Specifically, Anderson alleges that Dr. Kelly’s 2017
16 prescription for Prednisone to reduce inflammation in his face was far too high a dosage and that
17 such conduct violated Anderson’s rights to receive proper medical care while incarcerated. *Id.*
18 Anderson also alleges that the State of Nevada and NDOC discriminated against him in violation
19 of the Americans with Disabilities Act of 1990 (ADA). *Id.* at 16–18. Defendant Dr. Kelly filed a
20 motion to dismiss the lone claim against him: the claim for deliberate indifference. ECF No. 66.
21 For the following reasons, I grant Dr. Kelly’s motion to dismiss.

22 I. Procedural background

23 Anderson, who is incarcerated in the custody of NDOC at the Southern Desert
24 Correctional Center, originally filed a pro se complaint in the Eighth Judicial District Court of
25 Clark County, Nevada on January 30, 2020. ECF No. 1-1. This complaint was dismissed with
26 prejudice on March 4, 2021 for failing to state a claim for violation of the Eighth Amendment,

1 failing to state a claim for fraud, and failing to state a claim for the violation of Title II of the
 2 ADA. *Id.*

3 Later, on March 29, 2021, Anderson filed a complaint and an application to proceed *in*
 4 *forma pauperis* with the United States District Court for the District of Nevada, both of which
 5 were denied without prejudice by Magistrate Judge Elayna J. Youshah on April 13, 2021. ECF
 6 Nos. 1; 4. Anderson filed a second application to proceed *in forma pauperis*, which was approved
 7 by Judge Youshah on May 27, 2021. ECF Nos. 5; 12. Anderson filed a first amended complaint on
 8 May 7, 2021, which was dismissed in part with prejudice on August 4, 2021, for failure to state a
 9 claim, but Anderson was given leave to amend certain claims.¹ ECF Nos. 8; 13; 19.

10 Anderson filed his second amended complaint on October 12, 2021. ECF No. 25. Judge
 11 Youshah recommended that (1) any Title II ADA claims in Anderson's second amended
 12 complaint asserted against any individual named defendant be dismissed with prejudice; (2)
 13 that his Eighth Amendment claims against Drs. Aranas, Landsman, and Kelly, and Rebeca
 14 Kozloff, in their official capacities, be dismissed with prejudice; (3) that his false imprisonment
 15 claim, if intended to be asserted as a separate claim, be dismissed without prejudice and with
 16 leave to amend; and (4) that Anderson be allowed to file a third amended complaint if pro bono
 17 counsel is identified and makes an appearance on his behalf. ECF No. 28. Judge Gordon in turn
 18 accepted this report and recommendation in full. ECF No. 29.

19 Anderson, now represented by counsel, filed a third amended complaint (TAC) on
 20 February 17, 2023. ECF No. 48. Under Federal Rule of Civil Procedure 12(b)(6), Dr. Kelly filed a
 21 motion to dismiss with prejudice Anderson's second cause of action as to Dr. Kelly in Anderson's
 22 third amended complaint. ECF No. 66. The motion is fully briefed. ECF Nos. 71; 82.

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26 ¹Judge Andrew P. Gordon adopted the Report and Recommendation of Magistrate Judge Elayna J.
 Youshah to dismiss Anderson's first amended complaint (ECF No. 13). ECF No. 19.

1 II. Facts

2 Anderson alleges the following. Since February 24, 2012, Anderson has been in NDOC
 3 custody and is an inmate at the Southern Desert Correctional Center. ECF No. 48 at 4.
 4 Beginning on or about October 3, 2013, Anderson was diagnosed with Kimura disease, a rare
 5 chronic inflammatory condition that causes the tissue under the skin of the head or neck to
 6 become swollen. *Id.* Anderson's medical case was assigned to Dr. Landsman, who sent Anderson
 7 to Dr. Kelly in 2017. *Id.* at 13. Shortly after meeting with Anderson, Dr. Kelly prescribed Anderson
 8 20mg of prednisone in the summer of 2017. *Id.* at 13.

9 Later, on or around May 20, 2020, Anderson submitted a medical kite, requesting a
 10 different medication as the drug prednisone was no longer helping to decrease the swelling and
 11 inflammation. *Id.* Anderson alleges that since taking this higher dosage of prednisone, he has
 12 suffered from a host of medical issues he did not previously have, such as (1) diabetes; (2)
 13 decreased sexual desire; (3) damage to the adrenal glands; (4) thin, fragile skin; (5) slowed
 14 healing of cuts and bruises; (6) blood in his stool; (7) knee joint pain; (8) ninety pound weight
 15 gain; and (9) moon facies, among other things. *Id.* at 13–14.

16 After three years of using prednisone, Dr. Kelly allegedly informed Anderson in his June
 17 29, 2020 letter that 20mg of prednisone is not recommended, stating, "prednisone is best
 18 minimized. If a person takes more than 5mg a day of prednisone, undesirable side effects can
 19 occur." *Id.* at 14. Dr. Kelly ordered Anderson's provider, Dr. Landsman, to reduce the dosage,
 20 stating, "[y]our prednisone dose should be no more than 5mg a day." *Id.*

21 Anderson alleges that on or about September 23, 2020, he submitted a medical kite,
 22 informing medical of his visit with Dr. Kelly and their discussion that prednisone no longer
 23 works and requesting a new prescription for the inflammation to address his disease. *Id.*
 24 Anderson further alleges that on or about January 2022 he submitted additional kites regarding
 25 the painful inflammation in his knee. *Id.* Then, on or about February 25, 2022 and April 17, 2022,
 26 he submitted kites, reminding the medical staff at NDOC that he had been without proper

1 medical care to address his disease and the pain for two years. *Id.* Anderson contends that to
 2 date, he still has yet to receive the appropriate medical care to address his disease and further,
 3 that he has been denied pain medication to help with his pain. *Id.*

4 **III. Legal Standard**

5 **A. Motion to Dismiss**

6 The Federal Rules of Civil Procedure require a plaintiff to plead “a short and plain
 7 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
 8 Dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) where a pleader fails to state a claim upon
 9 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
 10 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on which
 11 it rests, and although a court must take all factual allegations as true, legal conclusions couched
 12 as factual allegations are insufficient. *Twombly*, 550 U.S. at 555.

13 Accordingly, Fed. R. Civ. P. 12(b)(6) requires “more than labels and conclusions, and a
 14 formulaic recitation of the elements of a cause of action will not do.” *Id.* To survive a motion to
 15 dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
 16 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
 17 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that
 18 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
 19 alleged.” *Id.* This standard “asks for more than a sheer possibility that a defendant has acted
 20 unlawfully.” *Id.*

21 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
 22 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
 23 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Under Fed. R. Civ.
 24 P. 15(a), a court should “freely” give leave to amend “when justice so requires,” and in the
 25 absence of a reason such as “undue delay, bad faith or dilatory motive of the part of the movant,
 26 repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the

1 opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” *Foman*
 2 *v. Davis*, 371 U.S. 178 (1962).

3 B. 42 U.S.C. § 1983

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
 5 the violation of a right secured by the Constitution or laws of the United States; and (2) that the
 6 alleged violation was committed by a person acting under color of state law. *See West v. Atkins*,
 7 487 U.S. 42, 48 (1988). “The traditional definition of acting under color of state law requires that
 8 the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made
 9 possible only because the wrongdoer is clothed with the authority of state law.’” *Paeste v. Gov’t of*
 10 *Guam*, 798 F.3d 1228, 1238 (9th Cir. 2015) (quoting *West*, 487 U.S. at 49). “Thus, generally, a
 11 public employee acts under color of state law while acting in his official capacity or while
 12 exercising his responsibilities pursuant to state law.” *West*, 487 U.S. at 50; *see also Naff v. Frey*, 789
 13 F.3d 1030, 1036 (9th Cir. 2015).

14 C. Eighth Amendment: Delay or Denial of Medical Treatment

15 The Eighth Amendment prohibits imposing cruel and unusual punishment and
 16 “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and
 17 decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the Eighth
 18 Amendment when he acts with “deliberate indifference” to the serious medical needs of an
 19 inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish an Eighth Amendment violation,
 20 a plaintiff must satisfy both an objective standard—that the deprivation was serious enough to
 21 constitute cruel and unusual punishment—and a subjective standard—deliberate indifference.”
 22 *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744
 23 F.3d 1076 (9th Cir. 2014).

24 To establish the objective prong, “the plaintiff must show a serious medical need by
 25 demonstrating that failure to treat a prisoner’s condition could result in further significant
 26 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th

1 Cir. 2006) (internal quotations omitted). Serious medical needs include those “that a reasonable
 2 doctor or patient would find important and worthy of comment or treatment; the presence of a
 3 medical condition that significantly affects an individual’s daily activities; or the existence of
 4 chronic and substantial pain.” *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014).

5 To satisfy the subjective deliberate indifference prong, a plaintiff must show “(a) a
 6 purposeful act or failure to respond to a prisoner’s pain or possible medical need and (b) harm
 7 caused by the indifference.” *Jett*, 439 F.3d at 1096. “Indifference may appear when prison officials
 8 deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in
 9 which prison physicians provide medical care.” *Id.* (internal quotations omitted). A prison
 10 official may only be held liable if he or she “knows of and disregards an excessive risk to inmate
 11 health and safety.” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004).

12 **IV. Discussion**

13 **A. Dr. Kelly’s motion to dismiss is granted.**

14 Dr. Kelly argues that Anderson has failed to state a claim upon which relief can be
 15 granted for three reasons. First, Dr. Kelly argues that the statute of limitations as to claims
 16 against him has long run. Second, Dr. Kelly argues that the claim against him mischaracterized
 17 as one for deliberate indifference, but in actuality is a claim of professional negligence or medical
 18 malpractice claim, both of which fail. Third, Dr. Kelly argues that Anderson fails to sufficiently
 19 allege facts showing he is a state actor. For the following reasons, I find that (1) Anderson’s claim
 20 is properly characterized; (2) the statute of limitations has not run; but nonetheless (3) that
 21 Anderson fails to state an Eighth Amendment violation.

22 ***I. Anderson’s claim is properly characterized.***

23 Dr. Kelly argues that the standards for a professional negligence or medical malpractice
 24 cause of action should apply when evaluating Anderson’s cause of action. I disagree.

25 Specifically, Dr. Kelly argues that Anderson’s complaint sounds in medical malpractice
 26 and generic negligence that gave rise to a personal injury, and thus, NRS 41.097 should apply.

1 ECF No. 82 at 11–13. Alternatively, Dr. Kelly argues that the gravamen of Anderson’s complaint is
 2 professional negligence under NRS 41A.071 against Dr. Kelly. *Id.* at 13–14. Dr. Kelly next argues
 3 that the complaint does not comply with NRS 41A.071 because Anderson did not submit a
 4 required expert affidavit which supports the malpractice allegations when Anderson filed, and
 5 thus should be dismissed on that ground. *Id.*

6 In essence, Dr. Kelly argues that Anderson’s Section 1983 claim is mischaracterized. He
 7 cites *State Farm Mut. Auto. Ins. Co. v. Wharton* for the proposition that “[w]hile a pleading party may
 8 attempt to color a claim for relief in the manner most beneficial to its litigation strategy, ‘it is the
 9 object of the action, rather than the theory upon which recovery is sought, that is controlling.’”
 10 ECF No. 66 at 12 (citing 495 P.2d 359, 361 (Nev. 1972)). This argument, at base, is just an
 11 offshoot of Dr. Kelly’s 12(b)(6) argument that Anderson has failed to adequately state a Section
 12 1983 claim—which he attempts to bolster here by arguing that Anderson’s allegations are one
 13 for a malpractice or negligence claim against him. While Dr. Kelly requests that the court
 14 transmute the allegations into a malpractice or negligence claim, the court is mindful of its
 15 obligation to construe pro se pleadings liberally and to afford a pro se litigant “the benefit of any
 16 doubt.” *United States v. Qazi*, 975 F.3d 989, 993 (9th Cir. 2020); *see also Bretz v. Kelman*, 773 F.2d
 17 1026, 1027 n.1 (9th Cir. 1985). Further, Dr. Kelly has provided no points and authorities or
 18 compelling reason to support why the court should alter Anderson’s claim of action here. For
 19 those reasons, I find that Anderson’s Section 1983 claim is properly characterized and will
 20 address the heart of Dr. Kelly’s argument—the sufficiency of the Section 1983 claim—herein.

21 ***2. The statute of limitations has not tolled.***

22 Because I reject Dr. Kelly’s argument that Anderson’s claims are mischaracterized, I also
 23 reject Dr. Kelly’s argument that NRS 41.097 provides the applicable statute of limitation over
 24 NRS 11.190(4)(e). *Id.* at 6. NRS 11.190(4)(e) is the applicable statute for a Section 1983 suit based
 25 on personal injury in Nevada, and thus it applies here. *Brodzki v. City of Chicago*, 2011 U.S. Dist.
 26 LEXIS 128187, *7 (D. Nev. Nov. 3, 2011).

1 The Nevada personal injury statute of limitation is two years. *See Perez v. Seevers*, 869 F.2d
 2 425, 426 (9th Cir. 1989) (citing NRS § 11.190(4)(c), (e)); *see Wallace v. Kato*, 549 U.S. 384, 387
 3 (2007) (holding that federal courts borrow state statutes of limitations for personal injury
 4 actions in § 1983 suits because § 1983 contains no statute of limitations). NRS 11.190(4)(e)
 5 maintains a two-year limitations period for “an action to recover damages for injuries to a person
 6 or for the death of a person caused by the wrongful act or neglect of another.” NRS 11.190(4)(e).
 7 The two-year period begins to run when the wrong occurs and a party sustains injuries for
 8 which relief could be sought. *Fausto v. Sanchez-Flores*, 482 P.3d 677, 680 (Nev. 2021) (citing *Petersen*
 9 *v. Bruen*, 106 Nev. 271, 274 (1990)).

10 Under federal law, “[a] claim accrues when the plaintiff knows, or should know, of the
 11 injury which is the basis of the cause of action.” *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999)
 12 (internal citation omitted). Accrual occurs when a plaintiff has a complete and present cause of
 13 action and may therefore file suit to obtain relief. *Lukovsky v. City and Cnty. of San Francisco*, 535 F.3d
 14 1044, 1048 (9th Cir. 2008). In a suit alleging deliberate indifference, the claim accrues when the
 15 prisoner “knew or had reason to know of the [prison] employees’ deliberate indifference to [the
 16 plaintiff’s] medical needs.” *TwoRivers v. Lewis*, 174 F.3d 987, 992 (9th Cir. 1999).

17 The parties disagree on the event that triggered the running of the statute here. Anderson
 18 argues that the earliest he could have discovered that Dr. Kelly was acting with deliberate
 19 indifference was May 20, 2020, which corresponds to when Anderson filed a kite specifically
 20 identifying prednisone as a medication that was no longer benefitting him. ECF No. 71 at 14. As a
 21 result, Anderson maintains that he had until May 20, 2022 to sue Dr. Kelly, and because he
 22 named Dr. Kelly in his July 30, 2021 complaint, the statute of limitations had not yet tolled. *Id.* at
 23 14–15. Dr. Kelly argues that the statute of limitations began to accrue the day he prescribed
 24 Anderson prednisone in the summer of 2017. ECF No. 66 at 9.

25 Dr. Kelly, however, admits that “[w]hile a lay person can easily discern that 20mg is
 26 higher than 5mg, a lay person would not know whether 20mg was too high for this Plaintiff at

1 the time Dr. Kelly prescribed 20mg of prednisone." *Id.* at 13. Indeed, Anderson alleges that it was
 2 not until he regularly took this medication that he realized that it not only failed to help with his
 3 condition, but it also caused significant additional medical issues. ECF No. 71 at 14. Anderson
 4 alleges that it was not until Dr. Kelly's June 29, 2020 letter that he should have known that Dr.
 5 Kelly was acting with deliberate indifference. *Id.* I agree. As a lay person, Anderson would not
 6 have known until Dr. Kelly informed him of the basis for his medical symptoms—the too high
 7 dosage—that he may have a viable claim for deliberate indifference. Thus, the appropriate
 8 measuring stick is June 29, 2020, and given that Anderson filed his complaint on March 29, 2021
 9 (and named Dr. Kelly as a defendant on July 30, 2021), both his complaint and claims against Dr.
 10 Kelly were timely and within the two-year statute of limitations period.

11 ***3. Anderson fails to state a Section 1983 claim.***

12 Dr. Kelly argues that Anderson fails to state an Eighth Amendment claim because (1) the
 13 conduct alleged fails short of the deliberate indifference standard and (2) even if the conduct
 14 were sufficient, Anderson fails to sufficiently plead that Dr. Kelly acted under color of state law.
 15 ECF No. 66 at 14–24. Anderson responds that he has adequately alleged both and points out
 16 that this court has already determined that Anderson sufficiently stated a Section 1983 cause of
 17 action against Dr. Kelly in his second amended complaint. ECF No. 71 at 10 (citing ECF No. 28 at
 18 7).² To succeed on a Section 1983 claim, a plaintiff must show that (1) the conduct complained of
 19 was committed by a person acting under color of state law; and (2) the conduct deprived the
 20 plaintiff of a federal constitutional or statutory right. *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th
 21 Cir. 2011).

22 To establish an Eighth Amendment deliberate indifference claim a prisoner plaintiff
 23 must show: (1) an objectively, sufficiently serious, deprivation of his medical needs, and (2) the
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25 ² Judge Andrew P. Gordon adopted, without de novo review, the Report and Recommendation of
 26 Magistrate Judge Elayna J. Youshah (ECF No. 28), which permitted Anderson's second amended Eighth
 Amendment claims to proceed against Drs. Aranas, Landsman, and Kelly, and Rebeca Kozloff, in their
 official capacities. ECF No. 29.

1 official was, subjectively, deliberately indifferent to the inmate's health or safety. *See Farmer*, 511
2 U.S. at 834. A defendant is deliberately indifferent if he knows that an inmate faces a substantial
3 risk of serious harm and disregards that risk by failing to take reasonable steps to abate
4 it. *Farmer*, 511 U.S. at 837. The defendant must not only "be aware of facts from which the
5 inference could be drawn that a substantial risk of serious harm exists" but he "must also draw
6 the inference." *Id.*

i. *Anderson fails to prove the subjective prong.*

8 Dr. Kelly alleges that the complaint fails to adequately state a Section 1983 claim, arguing
9 that he was not deliberately indifferent to Anderson because he was the medical professional
10 who advised Anderson that his prednisone dosing should be reduced to no more than 5mg per
11 day, which an indifferent physician would not do. ECF No. 66 at 17–18. Anderson responds that
12 he has alleged sufficient facts to show he had a serious medical need (his Kimura disease), and
13 that Dr. Kelly was deliberately indifferent to that medical need. ECF No. 71 at 13.

14 As a threshold matter, I find that the objective prong has thus been satisfied: Anderson
15 alleges that his continued progression of Kimura disease has resulted in numerous medical
16 issues, such as diabetes, damage to the adrenal glands, thin, fragile skin, and more. ECF No. 48 at
17 89; *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992) (“The existence of an injury that a
18 reasonable doctor or patient would find important and worthy of comment or treatment; the
19 presence of a medical condition that significantly affects an individual’s daily activities; or the
20 existence of chronic and substantial pain are examples of indications that a prisoner has a
21 ‘serious’ need for medical treatment.”).

22 Where Anderson's claim fails is a lack of sufficient facts demonstrating that the
23 subjective prong has been met. First, Anderson has not alleged facts supporting an inference
24 that Dr. Kelly engaged in a purposeful act or failure to respond to Anderson's medical treatment.
25 Indeed, even if Dr. Kelly erred in writing a prescription for 20mg prednisone, the complaint does
26 not demonstrate that such conduct evinces a conscious disregard of Anderson and his condition.

1 The complaint instead alleges that Anderson submitted a kite in May 2020, requesting “different
2 medication as the drug prednisone was no longer helping decrease the swelling and
3 inflammation” and that Dr. Kelly responded in June 2020, identifying the cause of the issue (too
4 high of a prednisone dose) and ordering that Anderson’s dose be reduced. ECF No. 48 at ¶¶ 88,
5 90. This demonstrates responsive action; not deliberate indifference. The complaint contains one
6 allegation that “[o]n December 16, 2019, Anderson submitted a Medical Kite, informing medical
7 that his intense headaches had returned, he had frequent numbness to the right side of his face,
8 and he had greater swelling than previously.” *Id.* at ¶ 87. To the extent this kite would have been
9 sufficient to alert Dr. Kelly to an issue with Anderson’s dosage created an excessive risk of
10 medical issues for Anderson, there are no allegations that Dr. Kelly read this kite or was
11 otherwise aware of it and chose to ignore it. *See Salgado v. Arias*, 2024 U.S. Dist. LEXIS 15515, *7–8
12 (S.D. Cal. Jan. 29, 2024) (finding plaintiff failed to plausibly allege subjective prong because,
13 while his complaint alleged that “maintenance” was ‘notified of the cells leaking in building D3”,
14 the complaint “fails to allege specific facts regarding [defendant’s] individual, personal
15 knowledge of the leak or the work order” or otherwise show how defendant was subjectively
16 aware the leak posed a substantial risk of serious harm). In other words, Anderson has not
17 alleged facts that support that Dr. Kelly knew of and disregarded an excessive risk to his health
18 and safety by prescribing the original 20mg dosage of prednisone. As a result, I find that
19 Anderson has failed to allege facts that satisfy the requirements of the subjective deliberate
20 indifference prong and therefore grant Dr. Kelly’s motion to dismiss Anderson’s Section 1983
21 claim for failure to state a claim.

22 **B. Anderson is given leave to amend the complaint.**

23 Because I cannot determine whether amendment would be futile, the complaint is
24 dismissed without prejudice and with leave to amend. *See Knappenberger v. City of Phoenix*, 566 F.3d
25 936, 942 (9th Cir. 2009) (Leave to amend should be granted unless the pleading could not
26 possibly be cured by the allegation of additional facts.). If Anderson chooses to file an amended

1 complaint, he must revise the complaint to include well-pleaded allegations specifically stating
2 that Dr. Kelly acted with deliberate indifference when he purportedly failed to treat or
3 mistreated Anderson for his Kimura disease.

4 **V. Conclusion**

5 IT IS THEREFORE ORDERED that Dr. Kelly's motion to dismiss [ECF No. 66] is
6 granted without prejudice and with leave to amend. Anderson has until April 15, 2024 to file
7 an amended complaint, if he chooses to do so. The amended complaint must be titled "Third
8 Amended Complaint."

9 Dated: March 31, 2024

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11 Cristina D. Silva
12 United States District Judge
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